Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

DONNIE ADKINS AND ROY L. WAGERS

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

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August 23, 1994

35 pp

## QUESTION PRESENTED

Whether an occupational disease claim "accrues" within the meaning of Section 56 of the Federal Employer's Liability Act, 45 U.S.C. §51, *et seq.*, when a claimant becomes aware that he has suffered injurious symptoms from a knowing exposure to an allegedly harmful substance, or whether the claim instead accrues at a later time when the plaintiff's injuries reach maximum severity or become permanent in nature.

## LIST OF PARTIES

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OCTOBER TERM, 1994

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*Petitioner,*

v.

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*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO
THE GEORGIA SUPREME COURT

Petitioner CSX Transportation, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Georgia Supreme Court, entered in the above-entitled proceeding on May 2, 1994.

## OPINIONS BELOW

The opinion of the Georgia Supreme Court is reported at 264 Ga. 203, 442 S.E.2d 737, reprinted in the Appendix hereto, Appendix A, A-1 – A-3. The opinion of the Georgia Court of Appeals is reported at 209 Ga. App. 488, 433 S.E.2d 392, reprinted in the Appendix hereto, Appendix B, B-1 – B-3. The state trial court's unreported orders are reprinted in the Appendix hereto, Appendix C, C-1 – C-2.

## JURISDICTION

On May 2, 1994, the Georgia Supreme Court affirmed the Georgia Court of Appeals' affirmance of the state trial court's denial of Petitioner's Motion for Summary Judgment. The Georgia Supreme Court denied Petitioner's Motion for Reconsideration on May 26, 1994, said Order being reprinted in the

Appendix hereto, Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

## STATUTES INVOLVED

45 U.S.C. §56 provides:

No action shall be maintained under this chapter unless commenced within three years from the date the cause of action accrued. . . .

## STATEMENT OF THE CASE

### A. Procedural Background.

Each Respondent filed a claim under the Federal Employer's Liability Act, 45 U.S.C. §51, *et seq.* ("FELA") against Petitioner alleging that he suffers from a condition known as "toxic encephalopathy" as a result of a fifteen year history of almost daily contact with DowClean and other solvents while employed by Petitioner. CSXT moved for summary judgment in the state trial court on the grounds that Respondents' claims were barred by the statute of limitations applicable under 45 U.S.C. §56. The trial court denied CSXT's Motion.

The Georgia Court of Appeals accepted CSXT's application for discretionary review of the trial court's order on November 25, 1992. After consolidating Respondents' cases for the purposes of CSXT's appeal, the Georgia Court of Appeals affirmed the trial court's denial of CSXT's summary judgment motion. After accepting discretionary review of CSXT's appeal from the Georgia Court of Appeals, the Georgia Supreme Court affirmed the judgment of the Court of Appeals and held that Respondents' claims were not time-barred.

### B. Statement Of Facts.

Respondents allege that they suffer from "toxic encephalopathy" as a result of their exposures to DowClean and other solvents while working as electricians for CSXT. According to Petitioner's expert, toxic encephalopathy manifests itself

through symptoms of balance problems, headaches, confusion, depression, and memory loss.

The record demonstrates that Respondents came into direct physical contact with DowClean innumerable times since 1971 and that on each occasion, they suffered from many of the same symptoms identified by the expert as constituting symptoms of encephalopathy. Indeed, Respondents testified that when using DowClean, the solvent would sometimes be sprayed on their clothes and the exposed parts of their bodies. With each exposure, the Respondents admitted that they suffered from the following immediate symptoms: (1) dizziness, (2) rashes, (3) difficulty breathing, (5) unsteadiness, (6) feelings of drunkenness, (7) staggering gait, (8) headaches and (9) disequilibrium. The Respondents admitted that these symptoms occurred "multiple times daily" while using DowClean and "continued over many years" from the the early 1970s.

Importantly, Respondents were aware that the solvent they were using was called "DowClean" and that it was the DowClean which allegedly caused these injurious symptoms. The record indisputably demonstrates that the Respondents were aware of the alleged relationship between their symptomology and their exposures to DowClean. For example, the Respondents told their doctor that after being exposed to DowClean and allegedly suffering immediate symptoms of intoxication, unsteadiness, dizziness, etc., they would take short breaks to "allow [themselves] to recover [their] faculties." One of the Respondents further testified that these symptoms would "get worse as the work week went on."

Despite the fact that these symptoms manifested themselves continuously since the early 1970s, Respondents did not file their lawsuits until September 5, 1991. The Georgia Supreme Court held that the multitude of symptoms which Respondents experienced throughout the 1970s and 1980s were only what the Court termed as "symptoms of non-injurious exposure" and that Respondents were excused from filing suit until "they were examined and diagnosed by a physician" as suffering from "toxic

encephalopathy" within the three years before suit was filed. 264 Ga. at 204, 442 S.E.2d at 739.

## REASONS FOR GRANTING THE WRIT

### I. The Georgia Supreme Court's Decision Conflicts With Applicable Decisions Of This Court.

The Georgia Supreme Court's decision to ignore the date on which Respondents' alleged injuries initially manifested themselves and postpone the accrual date of Respondents' claims until Respondents were diagnosed as suffering from toxic encephalopathy completely abrogates the standard established by this Court in *Urie v. Thompson*, 337 U.S. 163 (1949) and *United States v. Kubrick*, 444 U.S. 111 (1979) for the determination of the accrual date of an occupational disease claim. The decision herein represents a troublesome, but growing rift in the United States Courts of Appeals and state courts concerning the issue of whether the accrual of otherwise ripe federal claims should be postponed until such time as a claimant's injury reaches maximum severity or becomes permanent in nature. This diversion by the Court below and other United States Courts of Appeals establishes a dangerous precedent for a mushrooming crop of new cases involving diseases caused by repeated exposures to various chemicals.

The rule for the determination of the accrual date of an occupational disease claim under the FELA was enunciated by this Court in *Urie*, 337 U.S. 163. In *Urie*, a train worker contracted silicosis, a pulmonary disease, from the continuous inhalation of silica dust over a period of 30 years. Unlike Respondents in this case, the plaintiff in *Urie* did not know that he was being exposed to silica dust and was unaware of any resulting injury until a diagnosis of his condition was made. Importantly, it does not appear that the plaintiff in *Urie*, unlike Respondents, suffered from any symptoms or recognizable signs of injury before his diagnosis.

Based on these facts, this Court concluded in *Urie* that in the unusual circumstance where a specific date of injury "cannot

be determined" because it results from unknown exposures to a harmful condition over a period of time, a plaintiff's cause of action accrues when the injury manifests itself. The *Urie* Court intimated that where, as here, a claimant is *aware* that he is suffering from *some* sort of injury stemming from a traumatic exposure to a particular substance, he has a duty to investigate this injury and decide whether to sue or not within the appropriate statutory time frame. If, as in this case, the claimant fails to take such action and protect his claim within the prescription period, his claim is legally barred. The Court further sharpened this rule in the *Kubrick* decision.

In *Kubrick*, the Court, interpreting another federal statute of limitations, concluded that once a plaintiff is in possession of the critical facts of both an injury and its governing cause, the action accrues. In reaching this result, the Court stressed that statutes of limitations represent a "pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of state claims in time comes to prevail over the right to prosecute them.' " *Kubrick*, 444 U.S. at 117 (quoting *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1994)). Such statutes afford plaintiffs "what the legislature deems a reasonable time to present their claims" and concomitantly "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired." *Kubrick*, 444 U.S. at 117. *Kubrick* instructed that a court is "not free to construe [a federally-legislated limitations period] so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Id.*

Echoing *Urie*, the Court in *Kubrick* sharply distinguished between a plaintiff whose injury "may be unknown or unknowable," where the facts about causation are "in the control of the putative defendant" or "at least very difficult to obtain," (*id.* at 122), and a plaintiff who has requisite notice of his injury and its possible cause:

> The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has

> inflicted the injury. . . . There are others who can tell him if he has been wronged, and he need only ask.

*Id.* The Court thus concluded that:

> A plaintiff . . . armed with the facts about the harm done to him, *can protect himself by seeking advice* in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would *undermine the purpose of the limitations statute*.

*Kubrick*, 444 U.S. at 123 (emphasis added).

Under *Urie* and *Kubrick*, a claimant, who is aware or should be aware that he has suffered from some type of injury from a traumatic exposure to a harmful substance, must sue within the three years following the date he learned or should have learned these critical facts. This objective analysis leads to the inexorable conclusion that, contrary to the Georgia Supreme Court's decision, Respondents' claims are time-barred. When viewed from an objective standpoint, Respondents became aware that they were allegedly suffering from numerous maladies after being exposed to DowClean and that the DowClean allegedly caused these very ailments in the 1970s — long before the three years preceding the date on which suit was filed.

Ignoring this binding precedent, the Georgia Supreme Court created a novel distinction between Respondents' "temporary symptoms of non-injurious exposure, and the other and different symptoms of permanent degenerative brain disease" and held that Respondents' claims did not mature until Respondents' injuries reached a permanent stage of severity. 264 Ga. at 204, 442 S.E.2d at 739. At first blush, it is simply incredible that the Georgia Supreme Court would go so far as to hold that the headaches, rashes, balance problems, disequilibrium, etc. suffered by Respondents do not represent some type of cognizable injury. The headaches and disequilibrium suffered by Respondents are not unlike the symptoms associated with a concussion. Personal injury practitioners would not seriously contest that a concussion is a cognizable injury. Moreover, but

for these "non-injurious symptoms," Respondents would not even have the occupational disease at issue. Nevertheless, in an effort to preserve the otherwise stale claims involved in these cases, the Court has not only rewritten the rule established by this Court in *Urie* and *Kubrick*, but has created a new meaning for the term "injury."

Given the technical and medical complexity of this new type of occupational disease, the Georgia Supreme Court was apparently unwilling to impose on Respondents the responsibility of having to seek medical or legal advice to protect their claims. Recognizing that the purpose of the limitations statute is to require the reasonably diligent presentation of tort claims, however, this Court in *Kubrick* dispatched with a similar holding by the *Kubrick* Court of Appeals that the application of the statute of limitations should not be strictly applied in those cases involving complex medical and/or legal issues:

> But determining negligence or not is often complicated and hotly disputed, so much so that judge or jury must decide the issue after listening to a barrage of conflicting expert testimony. And if in this complicated malpractice case, the statute is not to run until the plaintiff is led to suspect negligence, it would be difficult indeed not to apply the same accrual rule to medical and health claims arising under other statutes and to a whole range of other negligence cases arising under the Act and other federal statutes, where the legal implications or complicated facts make it unreasonable to expect the injured plaintiff, who does not seek legal or other appropriate advice, to realize that his legal rights may have been invaded.

*Kubrick*, 444 U.S. at 124.

As in *Kubrick*, the difficulty in this case is that the Respondents did not seek medical or legal advice until long after their injuries first manifested based on their subjective belief that their injuries were not severe enough to warrant medical advice. The duty to seek such advice and determine within the period of

limitations whether to sue or not, however, is one to be borne by claimants such as Respondents — not CSXT. *Id.* The Court in *Kubrick* explained:

> Of course, he may be incompetently advised or the medical community may be divided on the crucial issue of negligence, . . . If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about injury.

*Id.*

The forgiving construction of Section 56 of the FELA by the Georgia Supreme Court is unsupported by the actual language of the Act and is in direct conflict with this Court's decisions in *Urie* and *Kubrick*. Recognizing that the very purpose of a statute of limitations is to establish a finite time frame for the presentation of claims, this Court in *Kubrick* sought to protect FELA defendants from having to defend stale claims by crafting an objective standard for the determination of the accrual of occupational disease claims. The Georgia Supreme Court's decision represents a flagrant contradiction of this standard. The Georgia Court not only redefined the term "injury," but also retreated from the objective analysis employed in *Kubrick* and established its own subjective and amorphous analysis for the determination of the accrual date of FELA claims. This Court should accept certiorari review to correct this conflict.

There are other compelling reasons why this Court's intervention is essential. First, given that an FELA claimant may legally file an FELA claim in any jurisdiction throughout the nation[1], Georgia's relaxed standard for the determination of the

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[1] 45 U.S.C. §56. *See also Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 52 (1941); *Missouri ex. rel. Southern R.R. Co. v. Mayfield*, 340 U.S. 1, 3-5 (1950); *Miles v. Illinois Central R.R. Co.*, 315 U.S. 698, 703 (1942).

accrual of an occupational disease claim may promote unfettered forum-shopping by FELA claimants. Otherwise stale claims may now be preserved by merely filing them in Georgia. Second, a growing conflict can be seen in the United States Courts of Appeals concerning the accrual of non-traditional occupational disease claims. These courts have fashioned *ad hoc* variations of the rule established in *Urie* and *Kubrick* in determining the accrual date of occupational disease claims, such as the instant claims, involving the manifestation of both traumatic and latent injuries caused by repeated traumatic exposures to a particular substance. For example, although the Fifth and Seventh Circuits have both addressed this issue under the rubric of *Urie* and *Kubrick*, these Circuits have nevertheless created *two distinct rules* for the determination of when an occupational disease case ripens.

This jumbled and myriad approach to the determination of the accrual date of an occupational disease claim completely defeats the letter and spirit of the FELA's statute of limitations and makes a mockery of any type of uniform application of this federal statute. This Court's guidance is needed to resolve this growing conflict. Unlike the Georgia Supreme Court, numerous federal and state courts have held that occupational disease claims such as the ones in question are time-barred under the analysis set forth in *Urie* and *Kubrick*. A failure to review the decision below jeopardizes an effective and uniform approach to the initial and most critical issue in any FELA case, i.e. when should the claim be filed?

## II. The Decision Below Conflicts With The Decision Of Several United States Court Of Appeals And Reflects A Split Of Authority Among The Circuits

### A. The Decision Below Conflicts With The First, Fourth, And Seventh Circuits' Interpretation Of The Accrual Date Of An Occupational Disease Case Under The FELA And The Decisions Of Numerous Federal And State Courts.

As discussed above, the occupational disease claims at issue represent a new, hybrid type of disease which does not fit into the pure latent injury mold. Unlike the classic latent injury claim, this new type of occupational disease manifests both traumatic *and* latent injuries. Nevertheless, as discussed below, numerous federal courts which have grappled with the determination of the accrual date of these claims, have applied properly the traditional *Urie* rule with the refining analysis employed in Kubrick. These decisions directly conflict with the Georgia Supreme Court's decision in this case.

Using *Kubrick* as a bench mark, the federal courts have created an exception to the traditional accrual rule applied in FELA cases involving latent injuries. In these cases, the courts have applied a limited "discovery" exception, pursuant to which a cause of action will first "accrue" for purposes of 45 U.S.C. §56 when a reasonable person knows or in the exercise of reasonable diligence should have known of the injury and its governing causes. The "discovery rule," as the courts have named this new rule, has been applied in a number of circuits to occupational disease claims involving both immediate and latent injuries stemming from repeated exposures to a particular substance or condition. *Albert v. Maine Cent. R.R.*, 905 F.2d 541, 543-44 (1st Cir. 1990); *Bealer v. Missouri Pac. R.R.*, 951 F.2d 38, 39 (5th Cir. 1991); *Townley v. Norfolk & W. Ry.*, 887 F.2d 498, 501 (4th Cir. 1989); *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3d Cir. 1986). *See In re Central R.R.*, 950 F.2d 887, 890-91 (3d Cir. 1991), *aff'd* 1991 WL 87886 (D.N.J. March 18, 1991), *cert. denied*, 112 S.Ct. 1586 (1992).

The Seventh Circuit's decision in *Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990) is the seminal case for the application of the discovery rule. In *Fries*, the Seventh Circuit held that *Urie* and *Kubrick* mandate that an FELA claimant must file his complaint within the three year period following the manifestation of symptoms which would place a reasonable person on notice that he is suffering from some type of injury. Unlike the Georgia Supreme Court, the Seventh Circuit recognized that *Urie* simply does not stand for the proposition that a plaintiff may wait indefinitely to file his suit until his injury reaches maximum severity or reaches a stage of permanency. Because of the disease's progressive nature and its manifestation of both immediate and latent symptoms, the occupational hearing loss claim involved in *Fries* is a classic example of the post-*Urie* type of occupational disease claim now being filed in the courts.

The plaintiff in *Fries* was employed by the defendant railroad as a machinist from April, 1969 to September, 1987. The plaintiff first began noticing auditory problems, in the form of tinnitus and diminished hearing sometime between 1980 and 1982. *Id.* at 1093. Both the plaintiff and his wife testified that they suspected the plaintiff had a hearing loss as far back as 1980 and 1981. Although they did not know the hearing problems were work-related, the plaintiff admitted that in 1981 and 1982 the frequency of the ringing would increase while at work and as the work week progressed. The ringing did subside, however, during the weekend. In this regard, the plaintiff and his wife did admit that they could not think of any other possible cause of the hearing loss. The plaintiff never informed the Railroad that he was having problems with his hearing, nor did he seek medical treatment for his hearing loss prior to 1985. In May 1985, the plaintiff was medically diagnosed as having a hearing loss. *Id.* at 1093-94.

The plaintiff in *Fries* filed suit in November 1987 and the Railroad moved to dismiss on the grounds that the plaintiff's action was time-barred by the FELA's three-year statute of limitations. In support of its motion, the Railroad argued that the

plaintiff's cause of action accrued in 1980 or 1981 when he first knew of potential problems with his auditory system and, at the same time, should have realized the problems were work related. The plaintiff argued in response that his cause of action did not accrue until 1985 when he was actually told by a physician that his injuries were work related. *Id.* at 1094. Based upon these facts, the district court granted the railroad's motion for summary judgment.

Following *Urie* and *Kubrick*, the Seventh Circuit upheld the judgment of the district court, ruling that "[a] cause of action accrues for statute of limitations purposes when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause." *Id.* at 1095. The Court further held that "the injured plaintiff need not be certain which cause, if many are possible, is the governing cause but only need to know or *have reason to know of a potential cause." Id.* (emphasis added). *See also, Davis v. United States,* 642 F.2d 328, 330 (9th Cir. 1981), *cert. denied,* 455 U.S. 919 (1982); *Barrett v. Hoffman,* 521 F. Supp. 307, 317 & n. 14 (S.D.N.Y. 1981), *rev'd on other grounds,* 689 F.2d 324 (2d Cir. 1982), *cert. denied,* 462 U.S. 1131 (1983).

Contrary to the Georgia Supreme Court's holding, the Seventh Circuit held that an occupational disease claim accrues when a claimant should realize that he is experiencing injurious symptoms despite the fact that the disease may not have reached maximum severity. *Fries*, 909 F.2d at 1096. Referencing this Court's analysis in *Urie*, the *Fries* Court recognized that "[w]hat the *Urie* Court did not do was provide an escape for plaintiffs who are aware that *some type of injury exists* yet who choose to ignore it by failing to seek diagnosis and investigate the cause." *Fries,* 909 F.2d at 1095 (emphasis added).

Unlike Georgia, other federal and state courts have, like the Seventh Circuit, refused to postpone the application of the FELA's statute of limitations until a claimant's injuries reach a stage of permanent injury. *See, e.g. Gregory v. Union Pac. R.R. Co.,* 673 F.Supp. 1544, 1547 (D. Nev. 1987) (refusing the toll the

statute of limitations until "the plaintiff complete[d] an investigation" "to determine the full extent of his injury"). *See also McCoy v. Union Pac. R.R. Co.*, 796 P.2d 646, 649 (Or. App. 1990) ("Plaintiff contends, additionally, that there is an issue of fact as to when his condition was serious enough to cause a claim to accrue . . . The accrual of a claim under FELA, however, does not require that the plaintiff's condition was bad enough to cause him to go to the doctor, according to the federal cases discussed above . . . .")

As recognized by the Seventh Circuit in *Fries* and in the other federal and state cases discussed above, the Georgia Supreme Court's distinction between the initial maladies resulting from a claimant's exposures to a harmful substance and a more permanent disease which may occur only after the passage of time is irrelevant to the determination of when an FELA claim accrues. To allow such a subjective distinction to toll the statute of limitations would defeat the purpose of the limitations statute. Nevertheless, based on this very distinction, claims which would be legally barred in these jurisdictions may now be filed in Georgia even when the claimant, as in this case, has experienced injurious symptoms for well over a decade. Certiorari review is necessary to rectify this conflict.

### B. The Decision Below Reflects a Conflict in the Circuits Concerning the Application of the Statute of Limitations to Occupational Disease Claims Under the FELA.

Causing further confusion as to the accrual date of an occupational disease claim under the FELA, the Fifth Circuit has refused to apply the traditional discovery rule to cases where a noticeable, traumatic exposure to a particular substance causes both immediate and latent injuries. Instead, in *Albertson v. T. J. Stevenson & Co.*, 749 F.2d 223 (5th Cir. 1984), the Court created yet another exception to the traditional rule established in *Urie* and *Kubrick*. The Court defined this new class of occupational disease cases as "traumatic event/latent manifestation" cases. *Id.* at 231. In these cases, the Court held that a claim accrues at the time a claimant realizes both that he is injured and what is

responsible for causing the injury even though the ultimate damage or resulting disease is unknown or unpredictable. *Id.* at 231-33.

The facts underlying the Fifth Circuit's holding demonstrate the model for this new type of "traumatic event/latent manifestation" case. The plaintiff in *Albertson* was exposed to the very solvent at issue herein for approximately four months. Immediately after this exposure, the plaintiff lost consciousness and experienced severe headaches on five or six occasions. Although his exposure to the solvent ceased, he continued to suffer from a steadily increasing crop of symptoms over the next 12 years and was ultimately diagnosed as suffering from encephalopathy. The defendant moved for summary judgment based on the analysis set forth in *Urie* and *Kubrick*.

Like the Respondents herein, the plaintiff in *Albertson* attempted to characterize his injury as a typical latent injury and argued that the statute of limitations should therefore be tolled. The Court disagreed and held that the plaintiff's case was more appropriately analyzed as a "traumatic event/latent manifestation case." *Id.* at 231. The Court defined the parameters of such a case as follows:

> A traumatic event/latent manifestation case is one in which the plaintiff has sustained both immediate and latent injuries caused by a noticeable, traumatic occurrence. At the time of the traumatic event, the plaintiff realizes both that he is injured and what is responsible for causing the injury. The full extent of the harm, however, has not become manifest.

*Id.*

The plaintiff in *Albertson*, as did the Respondents in this case, also argued that although he suffered headaches, blackouts, and nausea immediately after his exposure to the solvent and knew his exposure to the solvent caused these problems, the latent and allegedly much more severe injuries to his brain, liver, and skin were discovered long after the statutory limitations period had expired. He argued that the discovery rule was

designed to preserve claims such as his. Unlike the First, Fourth, and Seventh Circuits, the Fifth Circuit in *Albertson* refused to apply the discovery rule and held that the discovery rule should be applied "only when a plaintiff is unaware of and has had no reasonable opportunity to discover the critical facts of his injury and its cause." *Id.* at 233. The Court instead held that "[i]f *some injury* is discernible when the tortious act occurs, the time of event rule applies, and the plaintiff's cause of action is deemed to have accrued." *Id.* at 229 (emphasis added).

Rejecting the Georgia Supreme Court's tolling distinction between immediate injurious symptoms and permanent injuries resulting from the same traumatic exposure, the *Albertson* Court stressed that "[i]f the plaintiff later discovers that his injuries are more serious than originally thought, his cause of action nevertheless accrues on the earlier date, the date he realized that he sustained harm from the tortious act." *Id.* The basis for the Fifth Circuit's refusal to toll the statute of limitations until the ultimate damage to a claimant manifests itself is "grounded upon the nature and purpose of statutes of limitations." *Albertson,* 749 F.2d at 232. The Fifth Circuit premised its holding on this Court's recognition in *Kubrick* that prescriptive statutes are intended to strike a fair balance between a plaintiff's right to "a reasonable period of time within which to present his claim," *Albertson,* 749 F.2d at 232, and a defendant's right to "the prompt vindication of known rights to ensure that the defendant is not prejudiced as a result of lost evidence, fading memories, and disappearing witnesses." *Id.* at 232.

Unlike the Fifth Circuit, the Georgia Supreme Court ignored the teachings of *Urie* and *Kubrick* and held that a claimant may stay silent for decades while allegedly sustaining noticeable injuries from traumatic exposures to a chemical until his injuries reach a maximum stage of severity. The Fifth Circuit refused to apply such a subjective approach and held that such claimants have "the duty to comply with the applicable statute of limitations and make the defendant aware that he will pursue a claim against it." *Albertson,* 749 F.2d at 232.

As discussed above, the type of occupational disease claim involved in *Albertson* is a new, hybrid type of disease inasmuch as it exhibits *both* immediate *and* latent injuries resulting from repeated exposures to a harmful substance over time. The unique analysis employed in *Albertson* to what the Fifth Circuit termed as a "traumatic event/latent manifestation" case is more tailored to this new type of claim than the traditional discovery rule applied in the First, Fourth, and Seventh Circuits. The Georgia Supreme Court's analysis, on the other hand, not only conflicts with the decisions of *each* of these Circuits, but also conflicts with this Court's decision in *Urie* and *Kubrick*. This confusion and conflict among the Circuits and the state courts warrants this Court's guidance.

## III. Certiorari Review Is Necessary To Address The Critical Issue Of When An FELA Claim Accrues In Those Cases Where The Claimant Suffers From Both Immediate And Latent Injuries

This Court's review is necessary to restore uniformity in the federal and state courts as to the accrual of an FELA claim. The courts are now seeing an influx of occupational disease cases involving both traumatic *and* latent injuries caused by repeated exposures to allegedly harmful substances. While the traumatic injuries in these cases manifest themselves immediately, the latent or permanent injuries generally do not manifest themselves until years, perhaps decades, later. As noted above, the federal and state courts have developed several different standards for the determination of the accrual date of such claims. While the First, Fourth, and Seventh Circuits have created the "discovery rule," an objective analysis, to make this determination, the Fifth Circuit has employed the "time of event" rule, also an objective analysis, to this new class of "traumatic injury/latent manifestation" cases. While employing slightly different variations of the rule established by this Court in *Urie* and *Kubrick*, the Fifth and Seventh Circuits' objective analysis establishes that this new type of occupational disease claim will accrue once a claimant should be aware that he is suffering some type of injury and what caused it. Under these tests, Respondents' claims herein

would be barred in light of the undisputed evidence that they were fully aware of specific injuries associated with their exposures to DowClean long before the three years preceding the filing of their lawsuits.

In sharp conflict with this analysis, the Georgia Supreme Court has held that a claimant may ignore the initial signs of injury until his injuries progress to a permanent stage of severity. Perhaps the most troublesome aspect of the Georgia Supreme Court's decision is its distinction between "temporary symptoms of non-injurious exposure, and the other and different symptoms of permanent degenerative brain disease." This distinction is unfounded. Clearly, a layman will never be able to discern whether his injuries have become permanent without obtaining a medical diagnosis. Under this analysis, a claim may lay stagnant for years until the claimant subjectively decides that his injuries are bad enough to cause him to go to the doctor.

Requiring a medical diagnosis of permanent damage would defeat the purpose of the statute of limitations by allowing claims to become stale while the FELA claimant waits indefinitely to pursue medical treatment. Although the federal courts have recognized the difficulty of determining the date of "injury" in occupational disease cases, the courts have nevertheless held that an objective test, rather than the subjective test articulated by the Georgia Supreme Court, is necessary to prevent occupational disease claimants from being able to place their employers in the unfair position of having to defend claims, as in this case, that are 5, 10, and even 20 years old. "That this rule imposes on injured plaintiffs an affirmative duty to investigate the potential cause of his injury has not been lost on the courts. However, to apply any other rule would thwart the purposes of repose statutes which are designed to apportion the consequences of time between the plaintiff and defendant . . . and to preclude litigation of stale claims." *Fries*, 909 F.2d at 1095, citing *Nemmers v. United States,* 795 F.2d 628, 632 (7th Cir. 1986). For these reasons, federal law establishes that a medical diagnosis of an occupational disease is *not* a necessary predicate for the accrual of an FELA occupational disease claim.

In sum, the Georgia Supreme Court's decision completely defeats the purpose of the statute of limitations and conflicts with the federal decisions which have interpreted the statute. The lenient analysis employed by the Georgia Court will draw an influx of otherwise stale claims to be filed in Georgia. Contrary to this Court's teaching in *Kubrick* and the letter and spirit of the FELA's prescriptive statute, the Georgia courts will now "hav[e] to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick,* 444 U.S. at 117. This Court's review is necessary to correct the conflict created by the Georgia Supreme Court's decision and restore uniformity to the application of the statute of limitations by the federal courts.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Georgia Supreme Court in this case.

This 23 day of August, 1994.

Respecfully submitted,

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# APPENDICES

## APPENDIX A

### OPINION OF THE

# Georgia Supreme Court

S93G1664. CSX TRANSPORTATION, INC. v. ADKINS, et al.

HUNT, Chief Justice.

We granted certiorari to the Court of Appeals in *CSX Transp. v. Adkins,* 209 Ga. App. 488 (433 SE2d 392) (1993), to determine whether the causes of action in this case accrued more than three years before the suits were filed and were, therefore, barred by the statute of limitation. On September 5, 1990, Donnie Adkins and Roy Wagers filed suit against CSX Transportation, Inc. (CSX) seeking damages under the Federal Employers Liability Act (FELA), 45 USC § 51 et seq., for injuries resulting from work-induced toxic encephalopathy, a degenerative brain disease. After discovery, CSX moved for summary judgment in both cases on the grounds that the action was brought outside the statute of limitation. The trial court denied the motions. On interlocutory appeal, the Court of Appeals affirmed the trial court, holding that there was a genuine issue of material fact as to whether either employee should have investigated sooner the possibility of permanent injury. We agree and affirm.

Donnie Adkins and Roy Wagers were employed by CSX for many years at the Corbin diesel locomotive shop, where both men had as one of their primary duties the degreasing of locomotive electrical parts. The solvents used in the degreasing process are volatile chlorinated hydrocarbons which are toxic with chronic overexposure. From the beginning and throughout the years of their employment with CSX, both Adkins and Wagers experienced various symptoms of exposure to these solvents. More recently, both men have suffered from memory loss, depression, confusion, loss of balance and headaches, the symptoms of toxic encephalopathy.

Actions maintained under the FELA must be filed within three years from the day the cause of action accrues. 45 USC §

56. A claim accrues under FELA when the plaintiff possesses sufficient critical facts from which the injury and its cause, including its work-relatedness, should be plainly known. *Dubose v. Kansas City Southern R. Co.,* 729 F2d 1026 (5th Cir.), cert. den. 469 U. S. 854 (105 SC 179, 183 LE2d 113) (1984). CSX points out that Adkins and Wagers testified to experiencing symptoms of exposure from the beginning of their employment, and that the men both were aware that their symptoms improved when they moved away from the solvents and also complained that these symptoms were caused by their exposure to the solvents. From this, CSX argues that the plaintiffs knew, or in exercise of reasonable diligence should have known, of their injuries and the governing cause of the injuries prior to three years before the suits were filed. This argument, as the Court of Appeals found, fails to recognize the medical distinction between temporary symptoms of non-injurious exposure, and the other and different symptoms of permanent degenerative brain disease. The plaintiffs' medical expert testified by affidavit that the symptoms of exposure were not injuries and are not the same as the symptoms of toxic encephalopathy, a disease which is purely latent. An individual may suffer symptoms of exposure for years without or before developing this chemically caused injury or disease. While we disagree with the suggestion by the Court of Appeals that the existence of a medical diagnosis is necessary for one to be charged with knowledge of an injury and its cause[2], the evidence

---

[2] *Adkins,* 209 Ga. App. at 489. The federal courts have rejected the proposition that a cause of action for an occupational disease does not accrue until a plaintiff has been advised of the cause of his injury by a physician. See, e.g., *Sun Shipbuilding &c. Co. v. McCabe,* 593 F2d 234, 238 (3rd Cir. 1979) ("Although a physician telling an employee that his injury is work-related establishes a date no later than which the employees knows this fact, it does not exclude the possibility that the employee should have known of the relationship of the injury to employment prior to that date."); *Jones v. Maine Central R. Co.,* 690 F.Supp. 73 (D.Me. 1988) (Claim accrues under FELA when employee becomes aware not only of disease but also its cause; however, definite knowledge from medical diagnosis that injury is work-related is not required.). Such a requirement has also been rejected in a prior decision of the Court of Appeals. See *Robb v. CSX Transp.,*

*(footnote continues)*

in this case was sufficient to authorize a jury to find that Adkins and Wagers did not possess all the critical facts necessary to recognize injury and causation until they were examined and diagnosed by a physician.

*Judgment affirmed. All the Justices concur.*

DECIDED MAY 2, 1994 —
RECONSIDERATION DENIED MAY 26, 1994.

Certiorari to the Court of Appeals of Georgia —
209 Ga. App. 488.

*Alston & Bird, Jack H. Senterfitt, Linda G. Carpenter,* for appellant.

*Burge & Wettermark, Frank T. Burge, Michael J. Warshauer, Van Kirk McCombs II,* for appellees.

---

*(footnote continued)*

204 Ga. App. 690 (420 SE2d 370) (1992) (Where plaintiff who was exposed to excessive noise experienced hearing loss years before consulting a doctor about his hearing problems, the question of whether or not his condition was bad enough to cause him to go to a doctor is irrelevant since the evidence showed that he knew of its condition and cause.).

## APPENDIX B

OPINION OF THE

# Georgia Court Of Appeals

A93A0750. CSX TRANSPORTATION, INC. v. ADKINS.

A93A0751. CSX TRANSPORTATION, INC. v. WAGERS.
(433 SE2d 392)

SMITH, Judge

Adkins and Wagers brought separate actions for damages against their mutual employer, CSX Transportation, Inc., seeking recovery under the Federal Employers Liability Act (FELA), 45 USC § 51 et seq., for injuries sustained as a result of the same occupational disease. After discovery, CSX moved in each case for summary judgment on the basis of the statute of limitation. Although these motions were denied, the trial court timely certified its orders for immediate review. OCGA § 5-6-34 (b). CSX's applications for interlocutory appeal were granted by this court and timely notices of appeal were filed. The appeals raise identical enumerations of error arising out of substantially the same set of facts. Accordingly, they are hereby consolidated for disposition on appeal.

The evidence here would authorize finding the following facts: Plaintiffs have been employed by appellant for 19 years and 16 years respectively. Their primary responsibilities were to degrease diesel engines and engine parts by applying chemical solvents. The specific injury for which each plaintiff seeks recovery is toxic encephalopathy resulting from continued exposure to these chemical solvents. According to the medical testimony, the onset of toxic encephalopathy is manifested by memory loss, depression, confusion, loss of balance, and headaches. Throughout the years, each had experienced skin irritation upon direct contract with the solvent and a form of intoxication or lightheadedness after exposure. However, these reactions were always temporary. Neither plaintiff had experienced memory

loss or depression before as a result of exposure. Medical testimony distinguished between symptoms of *exposure,* such as the skin irritation and dizziness, and symptoms of *injury,* such as the loss of memory, depression, and loss of balance and coordination even in the absence of exposure to the solvent.

The applicable statute of limitation is 45 USC § 56: "No action shall be maintained under [the FELA] unless commenced within three years from the day the cause of action accrued." With respect to occupational diseases compensable under the FELA, "'no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently, the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves . . . '[Cit.]" *Urie v. Thompson,* 337 U. S. 163, 170 (69 SC 1018, 93 LE 1282) (1949).

"A claim accrues under the FELA only when the [employee] possesses sufficient critical facts from which the injury and its cause, including its work-relatedness, should be plainly known. [Cits.]' [Cit.]" *Robb v. CSX Transp.,* 204 Ga. App. 690, 693 (420 SE2d 370) (1992). However, an employee cannot avoid the statute of limitation by choosing to ignore the early signs and symptoms of his disease. A plaintiff has a duty to investigate an injury and cause when he experiences symptoms. *Bowles v. CSX Transp.,* 206 Ga. App. 6, 8 (2) (424 SE2d 313) (1992). In both *Robb* and *Bowles,* the claimant employee had been informed by a physician of the existence of hearing loss, the injury for which recovery was sought, well before the three-year period prior to the filing of suit. Because of this prior information, 45 USC § 56 was held to bar an action commenced more than three years after the employee had been so informed.

In this case, CSX supported its motion for summary judgment with undisputed evidence that both Adkins and Wagers always suffered skin irritation and temporary intoxication from exposure to the solvent supplied by CSX. Recognizing the medical distinction between the temporary symptoms of non-injurious exposure and the additional and qualitatively different

symptoms of permanent injury, CSX's evidence only confirms the existence of a genuine issue of material fact as to whether either employee should have investigated sooner the possibility of permanent injury. Viewing the evidence in the light most favorable to the non-movant employees, they did not possess all the critical facts until they were examined and informed by a physician in 1989. In that event, the claims were not untimely under 45 USC § 56 as a matter of law, and the trial court correctly denied summary judgment to CSX on the basis of the statute of limitation.

*Judgments affirmed. Johnson and Blackburn, JJ., concur.*

DECIDED JUNE 28, 1993 —
RECONSIDERATION DENIED JULY 14, 1993 —
CERT. APPLIED FOR.

FELA. Gwinnett State Court. Before Judge Mock.

*Alston & Bird, Jack H. Senterfitt, Linda G. Carpenter,* for appellant.

*Burge & Wettermark, F. Tucker Burge, Michael J. Warshauer,* for appellees.

## APPENDIX C

## ORDERS OF THE GEORGIA STATE COURT

## STATE COURT OF GWINNETT COUNTY
## STATE OF GEORGIA

| | |
|---|---|
| ROY L. WAGERS,<br>*Plaintiff,*<br>v.<br>CSX TRANSPORTATION, INC.,<br>*Defendant.* | CASE NO.<br>91-C-5811-1 |

**ORDER**

IT IS HEREBY ORDERED & ADJUDGED that defendant CSX Transportation, Inc.'s Motion for Summary Judgment is denied.

So ordered this 22nd day of October 1992.

Robert W. Mock, Sr.

**STATE COURT OF GWINNETT COUNTY**
**STATE OF GEORGIA**

| | |
|---|---|
| DONNIE ADKINS,<br>*Plaintiff,*<br>v.<br>CSX TRANSPORTATION, INC.,<br>*Defendant.* | CIVIL ACTION<br>FILE NO.<br>91-C-2199-1 |

**ORDER**

IT IS HEREBY ORDERED & ADJUDGED that defendant CSX Transportation, Inc.'s Motion for Summary Judgment is denied.

So ordered this 22nd day of October 1992.

Robert W. Mock, Sr.

## APPENDIX D

## THE GEORGIA SUPREME COURT'S ORDER DENYING MOTION FOR RECONSIDERATION

**SUPREME COURT OF GEORGIA**

ATLANTA MAY 26, 1994

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93G1664
CSX TRANSPORTATION, INC. v. DONNIE ADKINS ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

**SUPREME COURT OF THE STATE OF GEORGIA**

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

Supreme Court, U.S.
FILED
SEP 15 1994
OFFICE OF THE CLERK

No. 94-333

In The

# Supreme Court of the United States

October Term, 1994

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

DONNIE ADKINS AND ROY L. WAGERS,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Georgia**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

Whether an occupational disease claim can "accrue" under the FELA before the onset of the disease and at a time when it is unknowable whether the disease will ever develop.

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No. 94-333

In The

# Supreme Court of the United States

October Term, 1994

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

DONNIE ADKINS AND ROY L. WAGERS,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Georgia**

## RESPONDENTS' BRIEF IN OPPOSITION

*TO THE HONORABLE SUPREME COURT:*

The Respondents, Donnie Adkins and Roy L. Wagers, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, CSX TRANSPORTATION, INC.

## STATEMENT OF THE CASE

Respondents Donnie Adkins and Roy Wagers worked as electricians for Petitioner CSXT for many years.[1] Degreasing locomotive electrical parts was one of their primary duties throughout their careers. This task was accomplished by spraying the part with solvent. The solvents used were volatile chlorinated hydrocarbons. These solvents are toxic with chronic overexposure [Adkins R. 467-468; Wagers R. 396-397].[2] The toxic nature of these chemicals has been well-known in the medical field for many years and was well-known before these men began working for the railroad. [*Id.*] For these reasons solvent manufacturers recommended safety precautions with the use of these chemicals [Adkins R. 410]. These safety precautions were never followed by CSXT. CSXT never informed the Respondents of the dangers of these materials [Adkins R. 402; Wagers R. 325, 418]. On the contrary, the railroad represented to the Respondents that the solvents were safe to use. [*Id.*] The Respondents now suffer an occupational brain disease as the cumulative result of their years of unprotected exposures to toxic degreasing solvents throughout their careers [Adkins R. 77, 404 and 406; Wagers R. 328 and 329].

The occupational brain disease is known as toxic encephalopathy. [*Id.*] It is an organic brain disease which is purely latent in nature [Adkins R. 404-407; Wagers R.

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[1] Mr. Wagers worked for the Petitioner from October 1969 to October 1990. Mr. Adkins was employed from July 1971 to April 1991.

[2] Record references are to the record on appeal to the Supreme Court of Georgia.

328, 328-A, 329 and 331]. The symptoms of this disease are memory loss, depression, confusion, personality changes, fatigue, weakness and balance difficulties [Adkins R. 404-407; Wagers R. 328, 328-A, 329, 331 and 394]. Both of the medical specialists who have testified in these cases agree that until these symptoms of this occupational disease became manifest it is "unknowable" whether an exposed individual will ever contract the illness. [*Id.*] The first time that Mr. Adkins noticed any symptoms of this occupational disease was in early 1990 [Adkins R. 250]. Mr. Wagers first noticed symptoms in 1989 [Wagers R. 275, 276 and 325].

When their symptoms began, neither Respondent had any idea what was wrong with him. Each went to his family doctor, but the doctors were unable to identify either the condition or its cause [Adkins R. 267-268, 276]. It was not until these men were seen and treated by Dr. Michael Kelly, a board certified specialist in occupational medicine, that the disease was discovered and its cause revealed to the Respondents [Adkins R. 402; Wagers R. 325]. Dr. Kelly discovered the Respondents' disease and its cause in 1990 [Adkins R. 405; Wagers R. 328-328A]. These lawsuits were filed in September 1990. In addition to Dr. Kelly, these men have been examined and evaluated by Dr. Douglas Linz. Dr. Linz is also a board certified specialist in occupational medicine. He teaches occupational medicine at the University of Cincinnati Medical School. CSXT sent the Respondents to Dr. Linz for independent medical evaluations. Dr. Linz agreed with Dr. Kelly's diagnosis of an organic occupational brain disease secondary to the chronic overexposure to solvents [Adkins R. 406; Wagers R. 329]. **Importantly,**

**both of these medical specialists agree that the onset of the Respondents' occupational diseases occurred within the three years before their lawsuits were filed**[3] [Adkins R. 405-406; Wagers R. 328, 328A, 329]. **Both agree that the Respondents had suffered no solvent related injury before the onset of these symptoms and that the symptoms of exposure that these men experienced when spraying the solvent were neither injuries nor early symptoms of their occupational illness**[4]. [*Id.*]

CSXT moved for summary judgment claiming that the Respondents' actions are barred by the FELA's three year statute of limitations. CSXT claimed that the Respondents were injured and their claims for their occupational disease accrued at the time of their exposure to the solvents. CSXT produced no medical testimony in support of its contentions that the Respondents were injured at the time of their exposures or that the onset of the Respondents' occupational disease occurred more than three years before these lawsuits were filed. The trial court, the Georgia Court of Appeals and the Georgia Supreme Court all correctly held that these claims are not time barred. Each court unanimously found that these occupational disease claims did not accrue until the Respondents possessed the critical facts of their injury and its cause after seeing Dr. Kelly in 1990.

---

[3] The Petition fails to mention this unrebutted medical testimony.

[4] The Petition fails to mention that both medical specialists have refuted CSXT's contention that the symptoms of exposure were actual injuries.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I.

### THE DECISION OF THE GEORGIA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

This case presents no novel question of law. It is the application of disputed facts to the accepted legal standard for determining when the Respondents' occupational disease had its onset and when it became knowable which is at the heart of this Petition.

CSXT seeks a writ of certiorari on the issue of whether the Respondents' FELA claims for their occupational disease are time barred. CSXT argues that the Respondents' claims accrued at the moment that they were exposed rather than when the onset of their occupational disease occurred. This contention that the employee is "injured" at the time of exposure rather than at the time of the onset of an occupational disease has already been addressed and rejected by this Court. Under the applicable Supreme Court authorities the "discovery rule" controls the determination of when an occupational disease accrues under the FELA.

This Court first recognized that railroad employees could recover for occupational diseases under the FELA in *Urie v. Thompson*, 337 U.S. 163 (1949). Urie, the employee, sued under the FELA for silicosis which he claimed was the result of his exposure to excessive levels of silica dust throughout his many years of employment with the railroad. The defendant railroad claimed that Urie's action was barred by the statute of limitations. *Urie*, 337 U.S. at 169. The railroad argued in its brief that

Urie was injured at the time of his exposure to the silica dust "even though the development of consequential damages may be long delayed and even though the employee does not know of his injury." *Urie*, 93 L.Ed. 1282 at 1289. Since Urie's exposures occurred more than three years before the claim was filed, the railroad contended that the action was time barred. This is the identical argument that CSXT makes in this Petition. Rejecting this argument, the Court held that Urie's occupational disease claim was not time barred. *Urie*, 337 U.S. at 170. The Court adopted what has come to be known as the "discovery rule" for determining when a occupational disease accrues under the FELA:

> "It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently **the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves**. . . . "

*Id.* (quoting *Associated Indemnity Corp. v. Industrial Accident Commission*, 12 P.2d 1075, 1076 (Cal. 1932)) [emphasis supplied].

Holding that an employee is not "injured" until the accumulated effects of his exposures have resulted in occupational disease fulfills the FELA's humanitarian purpose. This Court acknowledged that it would be unjust to bar a railroad worker's occupational disease before the onset of the condition:

> If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis [more than three years before suit was filed], it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

*Id.* at 169. This Court did not "think the humane legislation plan [FELA] intended such consequences to attach to blameless ignorance." *Id.* at 170.

This Court reaffirmed its position that unknown and unknowable injuries do not start the statute of limitations in *United States v. Kubrick*, 444 U.S. 111 (1979). Kubrick sued under the Federal Tort Claims Act (FTCA) to recover for a hearing loss caused by alleged negligent drug treatment he underwent in a Veteran's Administration hospital in 1968. His physician informed him in January 1969 that it was highly probable that this drug treatment caused his hearing loss. His FTCA claim was filed in 1972. The Court found that Kubrick's claim was barred by the FTCA's two year statute of limitations. The Court held that the claim accrued in January 1969 when the physician had diagnosed Kubrick's condition and related it to the drug treatment. In response to Kubrick's argument that his action did not accrue until he learned

that the treatment he received was negligent, the Court distinguished between a plaintiff's ignorance of his injury or its cause and his ignorance of his legal rights saying:

> We are unconvinced that for statute of limitation purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should be given identical treatment. **That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain.** The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter.

*Kubrick*, 444 U.S. at 122 [emphasis supplied].

The Georgia Supreme Court's decision in these cases is not in conflict with either *Urie* or *Kubrick*. The Georgia Supreme Court applied the discovery rule. It stated the rule as follows: "A claim accrues under FELA when the plaintiff possesses sufficient critical facts from which the injury and its cause, including its work-relatedness, should be plainly known. *Dubose v. Kansas City Southern R. Co.*, 729 F.2d 1026 (5th Cir.), cert. den., 469 U.S. 854 (105 SC 179, 183 L.Ed.2d 113) (1984)." CSXT does not contend that the Georgia Supreme Court's statement of the discovery rule is flawed; it is the application of the rule to the facts in these cases with which CSXT takes exception. CSXT argues that under the facts of these cases the Georgia Supreme Court was compelled to find that the plaintiffs were injured and their actions accrued at the time that these men were exposed to the degreasing solvents

and experienced exposure symptoms. This argument is factually and legally flawed.

In order for CSXT to prevail the Court would have to ignore the testimony of the medical specialists who have testified in these cases. It is these specialists, including CSXT's hand-picked expert, and not the Georgia Supreme Court, who distinguished the employees' symptoms of exposure from symptoms of their occupational disease. It is these doctors who explained in their affidavits that symptoms of exposure are not injuries. They testified that this occupational disease is purely latent such that it is "unknowable" whether exposures will ever lead to any occupational disease until the symptoms of the occupational disease manifest themselves. Finally, it is these specialists who unequivocally place the onset of the Respondents' latent occupational disease within the three year period before their lawsuits were filed. That the Georgia Supreme Court reached its decision based upon the testimony of these specialists is evident from the text of the opinion:

> This argument[5], as the [Georgia] Court of Appeals found, fails to recognize the medical distinction between temporary symptoms of non-injurious exposure, and the other and different symptoms of permanent brain disease. The plaintiff's medical expert testified by affidavit that the symptoms of exposure were not injuries and are not the same as the symptoms of toxic encephalopathy, a disease which is

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[5] CSXT's argument that these actions are time-barred because the employees experienced exposure symptoms when using solvents more than three years before the suits were filed.

> purely latent. An individual may suffer symptoms of exposure for years without or before developing this chemically caused injury or disease. While we disagree with the suggestion by the [Georgia] Court of Appeals that the existence of a medical diagnosis is necessary for one to be charged with knowledge of an injury and its cause[footnote omitted], **the evidence in this case was sufficient to authorize a jury to find that Adkins and Wagers did not possess all the critical facts necessary to recognize injury and causation until they were examined and diagnosed by a physician.**

*CSX Transportation, Inc. v. Adkins, et al.*, at A-2 in the Petition [emphasis supplied].

Neither *Urie* nor *Kubrick* stand for the proposition that an occupational disease claim can accrue before the disease develops or at a point in time when it is unknowable whether it ever will. In fact these cases hold just the opposite. It is a commonplace of occupational medicine that one cannot possess all of the critical facts of an occupational disease before it develops. Likewise, it is common sense that one cannot possess all of the critical facts from which one should plainly know of an occupational disease at a point in time when it is unknowable whether the disease will ever develop. That is the reason the Court in *Urie* held that a railroad employee is not legally "injured" until the symptoms of his occupational disease manifest themselves. The occupational disease in these cases is toxic encephalopathy. It is a purely latent condition. The Respondents were not "injured" with this

condition until they developed symptoms of this condition. The doctors agree that these symptoms began within the limitations period.

The medical testimony which the Georgia Supreme Court found to be dispositive of CSXT's motion for summary judgment is not addressed by CSXT in its Petition. CSXT does not address the medical testimony in the record because none of it supports its contention that the symptoms of exposure that these men experienced were injuries. Instead, CSXT offers a false analogy, unsupported in fact. There are two reasons this approach fails. First, CSXT's comparison of the symptoms of exposure to those of concussion is insufficient as a matter of law. Analogies are no substitute for evidence. The record contains no testimony supporting CSXT's analogy. Whether these symptoms are or are not injuries is undeniably a medical question. Such questions cannot be resolved without expert medical testimony. "[E]xpert testimony is required where the disposition of a 'medical question' controls the resolution of a case." *Bowles v. CSXT*, 206 Ga.App. 6, 424 S.E.2d 313 (1992). Secondly, the only evidence involving a comparison of these exposure symptoms refutes CSXT's characterization and, thus, highlights the existence of a factual dispute. Dr. Kelly likens the exposure symptoms to the tears one gets when chopping an onion. The tears are a symptom of exposure to the onion but not of injury. The cook has not been injured in the slightest [Adkins R. 405; Wagers R. 328 and 328-A].

CSXT desperately attempts to distinguish the Adkins and Wagers cases from *Urie* by stating that *Urie* involved a case wherein the plaintiff did not know that he had

been exposed to silica dust. In truth, the opinion does not address the fact of whether Urie was or was not aware of his exposure, for this fact is irrelevant to the holding. The FELA compensates railroad employees for injuries and not for exposures. It is the unknowable nature of Urie's occupational disease that the Court addressed, not his exposures. If CSXT's position were correct, every employee who was knowingly exposed to solvents, asbestos, silica sand, coal dust, noise, or any other hazardous substance or condition capable of causing a latent occupational disease would have to file an action for the disease at the time of each exposure even though it was impossible to know at that time if the disease would ever develop. It would be the potential for developing the disease which would become actionable and compensable under the FELA rather than the disease itself. This argument is incompatible with the *Urie* requirement that the statute of limitations only begins to run "when the accumulated effects of the deleterious substance manifest themselves." *Urie*, 337 U.S. at 170. In fact, this Court rejected this "breath by breath" accrual analysis in *Urie* as a purely "mechanical analysis" calculated only "to thwart the congressional purpose" of the FELA. *Urie*, 337 U.S. at 169.

Mr. Adkins and Mr. Wagers did not have a cause of action for occupational brain disease as a matter of law before their symptoms of toxic encephalopathy manifested themselves. In *Schwitzer v. Consolidated Rail Corp. (Conrail)*, 758 F.2d 936 (3rd Cir. 1985), cert. den., 474 U.S. 864 (1985), the Court of Appeals for the Third Circuit addressed the degree of injury necessary to maintain a FELA action for an occupational disease. The court held

that subclinical injury is insufficient to maintain a FELA action for a latent occupational disease. The Court explained its decision as follows:

> [S]ubclinical injury resulting from exposure . . . is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law.
>
> Moreover, we are persuaded that a contrary rule would be undesirable. . . . If mere exposure to asbestos were sufficient to give rise to a FELA cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious proof of damages in such cases would be highly speculative, likely resulting in windfalls to those who never take ill and insufficient compensation for those who do. Requiring *manifest injury* . . . avoids these problems and best serves the underlying purpose of tort law; the compensation of victims who have suffered.

*Schwitzer,* 758 F.2d at 942 [emphasis supplied]. This statement succinctly explains and validates the rationale of *Urie*'s manifest injury requirement and lays to rest CSXT's argument.

## II.

## THE DECISION OF THE GEORGIA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION OF ANY UNITED STATES COURT OF APPEALS OR ANY OTHER STATE COURT OF LAST RESORT.

There is no conflict among the circuits or states regarding the proper standard for determining when a

latent occupational disease action accrues under the FELA. All are bound by and follow Urie's discovery rule. Under this two-prong rule, an FELA claim for an occupational disease accrues when the employee becomes aware of both his condition and its cause. *Young v. Clinchfield RR Co.*, 288 F.2d 499 (4th Cir. 1961); *Kitchline v. Consolidated Rail Corp.*, 800 F.2d 356 at 358 (3rd Cir. 1986). The Georgia Supreme Court applied this two-prong discovery rule in these cases. Issues of fact compelled its decision finding that these claims were timely filed. Viewing the facts in the light most favorable to the Respondents, reasonable and fair-minded jurors could conclude from the facts in the record that the onset of the employees' occupational disease took place within the three years before their suits were filed; that the first time Mr. Wagers noticed any symptoms of his occupational disease was in 1989 and for Mr. Adkins the first symptoms began in 1990; that the first time they knew or suspected that they were suffering from a work-related condition was after Dr. Kelly reached his diagnosis in 1990.

*Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990), cited by CSXT in the Petition, requires the same result. In that case, the Seventh Circuit Court of Appeals applied the *Urie* two-prong discovery rule to the facts of an occupational hearing loss claim. The claimant in *Fries* admitted that he had suffered a hearing loss by 1981 or 1982. Because he did not file his FELA action until 1987, the Court held that his claim was time-barred stating:

> In sum, our application of the principles outlined above [the *Urie* and *Kubrick* discovery rule principles] to the question of when Fries' action

> accrued dictates a finding that the statute of limitations ran in 1984, three years after Fries knew, or should have known in the exercise of reasonable diligence, of both his injury and its cause. Fries began work for the railroad in 1969 and, although he alleges in his complaint that he was exposed to injurious noises since that time, the clock did not begin running on his FELA claim until the injury manifests itself and he should have reasonably known its cause in 1981.

*Fries*, 909 F.2d at 1097. Thus, it is the facts rather than the standard for determining accrual which distinguishes the Georgia Supreme Courts' decision in these cases from *Fries*. Fries' hearing loss manifested itself more than three years before his suit was filed by his own admission, while the Respondents' testimony and that of the medical specialists place the onset of their occupational disease within the three years before their cases were filed. *Fries* does not hold that a cause of action for a latent occupational disease accrues prior to the onset of that condition or at a point in time when it is unknowable whether it ever will develop. That the application of the discovery rule is highly fact sensitive is well recognized, and courts "must be attentive that no genuine issues remain." *Jones v. Maine Central R. Co.*, 690 F.Supp. 73, 75 (D.Me. 1988). "Ordinarily, the question of whether and when an employee knew or should have known that he had an occupational disease is one of fact for the jury." *McCoy v. Union Pacific RR Co.*, 796 P.2d 646, 648 (Ore. Ct. App. 1990).

*Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223 (5th Cir. 1984), is the other case cited by CSXT in its Petition as supporting its contention that the Georgia Supreme Court

wrongly applied the discovery rule in these actions. *Albertson* is both factually and legally distinguishable from *Adkins* and *Wagers*. *Albertson* involved a traumatic injury rather than a latent occupational disease. *Albertson* does not involve the application of the discovery rule. Albertson, a seaman, was rendered unconscious on multiple occasions during a four-month voyage in 1969 by a chemical he knew to be dangerous. Immediately after his last blackout Albertson began suffering headaches so severe that strong pain medication failed to allay them. He went to medical specialists right away for his problems and was hospitalized. During the hospitalization he underwent an EEG which revealed an abnormal brain wave pattern. After his hospitalization Albertson's doctor refused to certify him as being fit for sea duty, and he never worked aboard a ship again. Albertson's problems continued and intensified after his discharge from the hospital. His problems became so severe and intolerable that in 1972 Albertson attempted suicide by shooting himself in the head. He underwent two brain operations as a result of the gunshot wounds. Albertson was hospitalized on several occasions between his 1969 exposures and 1981, when he filed his lawsuit under the Jones Act[6] seeking compensation for the problems he had suffered

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[6] 46 U.S.C. app. § 688 (1988). "The Jones Act extended to maritime workers the negligence remedy provided for interstate railroad workers by the Federal Employers' Liability Act." Braen v. Pfeiffer Oil Tran. Co., 361 U.S. 129, 135 (1959) (Harlan, J., concurring in part and dissenting in part). Cases decided under the Jones Act are *in pari materia* with cases decided under the FELA. *See* Sentiles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959).

since 1969. The defendant's motion for summary judgment was granted by the trial court and the Fifth Circuit Court of Appeals affirmed. Because Albertson knew that he had suffered a substantial injury at the time of his exposure the Court refused to apply the discovery rule stating:

> Albertson's case is different from these typical cases in which the discovery rule is applied. Albertson knew both that he was injured and the cause of his injury at the time of the injury in 1969. After his last exposure to the [toxic substance], Albertson lost consciousness, was administered minor medical care, and endured an excruciating headache for the remainder of the voyage. He informed his superiors that he would not apply the [toxic substance] again, indicating his awareness of the cause of his injury. His medical condition was so severe after he returned to land that he was soon thereafter decertified as being fit for sea duty, and he never served on board a vessel again. These facts make clear that Albertson's is not a pure latent injury case. The discovery rule cannot justify his failure to file suit for over twelve years.

*Albertson*, 749 F.2d at 231. These facts are not similar to those in Adkins and Wagers which do involve purely latent injuries. The *Albertson* decision does not support the premise that a purely latent injury accrues at the time of exposure, but expressly rejects it:

> This is not a case in which, coinciding with the trauma, an injured seaman experienced and noticed only a minor injury and at a later time discovered an unexpected latent injury that was

> unknown and unknowable at the time of the traumatic event.

*Id.* at 233.

The Petition does not confront the Court with a situation in which these claims are time-barred in one circuit or state but not in another. In cases involving latent injuries which are unknown and unknowable at the time of exposure, the Fifth Circuit has consistently applied the discovery rule just as the Georgia Supreme Court did in these actions. See, e.g., *Smith v. States Marine International*, 864 F.2d 410 (5th Cir. 1989); *Taurel v. Central Gulf Lines, Inc.*, 947 F.2d 769 (5th Cir. 1991).

The Respondents' injuries were purely latent and were unknowable until their symptoms manifested themselves within the limitations period; consequently, their claims are timely under the discovery rule regardless of where the rule is applied. Neither the Fifth Circuit, nor the Seventh Circuit, nor any other circuit or state applies the discovery rule so as to bar occupational diseases before their onset or at a point in time when it is unknown and unknowable whether the condition ever will manifest. To do so would be error in light of this Court's decisions in *Urie* and *Kubrick*.

## CONCLUSION

The Petition does not present this Court with any significant conflict with any decision of this Court or between the circuits or state courts of last resort, with any fundamental error below, or with any other compelling reason to grant the writ. Consequently, the Petition is due to be denied.

Respectfully submitted this 15th day of September, 1994.

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